

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

DEACON ENTERPRISES, INC, a Michigan Corporation,

Plaintiff/Counter-Defendant,

-v-

ROBERT PASEK, a Michigan, Resident, and TBD EXCAVATING, LLC, a Michigan Limited Liability Company, jointly and severally,

Defendants/Counter-Plaintiffs.

Case No. 15-000083-CK

15-000083-CK

Hon. Daniel P. Ryan

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CATHY M. GARRETT
/s/ Michelle Howard

OPINION

This matter is before the Court on a Motion for Summary Disposition pursuant to MCR 2.116(C)(10) filed by plaintiff Deacon Enterprises. For the reasons stated below, the Court will grant the motion for summary disposition and dismiss defendant Robert Pasek and TBD Excavating's Counter-Complaint.

1. Facts and Procedural History

On October 17, 2013, defendant TBD Excavating (TBD) and Deacon Enterprises entered into a purchase agreement pursuant to which Deacon agreed to sell property located at 600 Deacon Rd, Detroit, Michigan (the Property) to TBD for \$185,000. TBD executed a promissory note dated October 17, 2013 setting forth the interest and repayment terms of the loan to acquire the Property. The promissory note was personally guaranteed by defendant Robert Pasek. The purchase agreement included an "As-Is" clause, which provided:

16. As-Is Purchase. Seller hereby specifically disclaims any warranty (oral or written) concerning (i) the nature and condition of the Property and the suitability thereof for any and all activities and uses that Buyer may elect to conduct thereon; (ii) the nature and condition of the Property and the suitability thereof for any and all activities and uses that Buyer may elect to conduct thereon; (iii) the manner, construction, condition and state of repair or lack of repair of any improvements located thereon; . . . it being specifically understood that Buyer has had an opportunity to determine for itself the condition of the Property and (v) any other matter whatsoever except as expressly set forth in this Agreement. Except as it is otherwise expressly provided in this Agreement, the sale of the Property as provided for herein is made on a strictly "AS IS" "WHERE IS" basis as of the Closing Date. Buyer expressly acknowledges that, in consideration of the agreements of Seller herein, Seller makes no warranty or express representation, express or implied, or arising by operation of law, including, but in no way limited to, any warranty of quantity, quality, condition, habitability, merchantability, suitability or fitness for a particular purpose of the Property, any improvements located hereon, or any soil conditions related thereto.

A second promissory note dated October 17, 2013 was executed for \$161,836.84 to cover the demolition of the building located on the Property. As security for one of the notes, TBD executed a mortgage in Deacon's favor on the Property.

Defendants allege that after purchasing the Property, TBD's architect discovered that the Property was not legally connected to the City of Detroit water or sewer systems. Defendants also allege that Deacon's President's Son, Steven Eppert, informed defendant Pasek that Deacon had buried a railroad car on the Property and had been using that sunken railroad car to discharge sewage into it. Eppert also allegedly told Pasek that Plaintiff had used the sunken railroad car to dispose of waste oil. Defendants received a quote of \$700,000 to properly connect the Property to the City of Detroit water and sewer system. Defendants did not make any payments on either promissory note. According to Deacon the total now owed on both promissory notes, including interest, is \$372,805.69.

Deacon then initiated the instant action for breach of contract and enforcement of the personal guarantee by Pasek. Defendants filed a counter-claim alleging fraudulent misrepresentation, silent fraud, and mutual mistake of fact. Presently before the court is Deacon's motion for summary disposition pursuant to MCR 2.116(C)(10) on both its claims and defendants' counter-claims.

2. Standard of Review

Deacon brings its motion pursuant to MCR 2.116(C)(10). In reviewing a motion under MCR 2.116(C)(10), a court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the nonmoving party. *Corely v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

3. Analysis

Deacon argues that there is no genuine issue of material fact that the promissory notes were legally executed and that defendants breached their terms when they failed to make the required payments. Deacon further argues that the "As-Is" clause in the agreement is valid and bars any claims defendants may have concerning the condition of the Property. In response, defendants do not contest that they executed the promissory notes or that they failed to make the required payments. Rather, they argue that Deacon's claims are barred by the doctrine of unclean hands, fraud and silent fraud, and mutual mistake of fact.

A. Unclean Hands

Defendants first argue that Deacon should be barred from recovering on the promissory notes based on the doctrine of unclean hands. Deacon is suing for breach of contract and is seeking contract damages. The clean hands doctrine requires that “[o]ne who seeks the aid of equity must come in with clean hands.” *Isbell v Brighton Area Schools*, 199 Mich App 188, 189; 500 NW2d 748 (1993). “An action for damages for a breach of contract is historically an action at law, not equity.” *Stroud v Glover*, 120 Mich App 258, 261; 327 NW2d 462 (1982). Because Deacon’s claims are for breach of contract, Deacon is not seeking the aid of equity. Accordingly, the clean hands doctrine is not applicable.

B. Fraud and Silent Fraud

Defendants next argue that Deacon’s claim for breach of contract is barred by fraud and silent fraud. Specifically, defendants assert that Steven Eppert, Deacon’s President’s Son, informed Pasek that the Property was hooked up to the Detroit water system, but did not inform him that it was an illegal hookup, or that there was no sewage hookup and did not inform him about the sunken railroad car full of sewage and waste oil.¹

As an initial matter, the Court notes that purchase agreement’s “As-Is” clause does not bar the fraud and silent fraud claims. “‘As is’ clauses transfer the risk of loss where the defect should have reasonably been discovered upon inspection, but was not.” *Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994). However, they do not transfer the risk of loss

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The Court notes that defendants have not alleged or established that Steven Eppert was an agent for Deacon who was authorized to make such statements on Deacon’s behalf or that Eppert’s statements were otherwise binding on Deacon.

where “a seller makes fraudulent representations before a purchaser signs a binding agreement.” *Clemens v Lesnek*, 200 Mich App 456, 460; 505 NW2d 283 (1993).

“As a general rule, actionable fraud consists of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage.” *M&D, Inc v W.B. McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). Pasek asserts that Eppert informed him prior to the execution of the purchase agreement, that the Property was hooked up to the Detroit water system. As defendants admit in their brief, this statement was not false. The Property was hooked up to the Detroit water system, albeit illegally. Furthermore, Pasek has come forward with no evidence to establish that Eppert or Deacon, even if the statement could be considered false, knew that the statement was false or made it recklessly. Accordingly, the Court will deny defendants’ claim that the promissory note is invalid.

Defendants also claim that Deacon’s conduct constituted silent fraud.

Under Michigan law, “silence cannot constitute actionable fraud *unless* it occurred under circumstances where there was a legal duty of disclosure.” *M&D, supra* at 29. Historically, silent fraud claims have been “based upon statements by the vendor that were made in response to a specific inquiry by the purchaser, which statements were in some way incomplete or misleading.” *Id* at 31. As a general rule then, “in order to prove a claim of silent fraud, a plaintiff must show that some type of representation that was false or misleading was made and that there was a legal or equitable duty of disclosure.” *Id* at 32. As to the latter requirement, an

equitable duty of disclosure generally arises only upon an expression of concern or direct inquiry by a purchaser regarding the particular issue in question. *Id* at 33. In this case, defendants have offered no proof that they asked Deacon questions that might arguably have imposed on Deacon the obligation to disclose the lack of a legal water and sewer hookup or the sunken railroad car. Accordingly, they cannot establish that Deacon violated an equitable duty of disclosure.

Nonetheless, defendants point out that it remains possible that “highly misleading actions” could support a claim for silent fraud absent specific inquiry. *Id* at 33-34. That is, “to the extent that a representation can be action or conduct and can be actionable as silent fraud if the action or conduct is intended to create a misimpression to the opposing party.” *Id*. In *M&D*, the alleged conduct included the painting and removal of damaged carpet following a flood on the property that the buyers alleged the sellers knew about, but failed to disclose. The *M&D* court noted that the fact that the property may have been cleaned, painted, and some carpet replaced was not sufficient evidence that the seller intended to create an affirmative impression that there was no flooding problem with the building. *Id* at 34.

In this case, there is no evidence that Deacon, even if it buried the railroad car, did so to mislead defendants into executing the purchase agreement. Accordingly, defendants have not established that Deacon’s contract claim is barred due to silent fraud.

C. Mutual Mistake of Fact

Finally, defendants argue that Deacon’s claim for breach of contract should be denied due to mutual mistake of fact. A mutual mistake of fact is an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction. *Briggs Tax Service, LLC v Detroit Public Schools*, 485 Mich 69, 77; 780 NW2d 753 (2010). A

mutual mistake of fact generally allows a rescission of a contract. *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 441; 716 NW2d 247 (2006).

Defendants argue that there was a mistake of fact concerning whether the Property was hooked up to Detroit Water and Sewage and whether there was a sunken railroad car full of sewage and waste oil. However, defendants argue that Deacon knew about the lack of legal hookup and knew about the sunken railroad car prior to the sale of the Property. Accordingly, there could not be a *mutual* mistake of fact and defendants are not entitled to rescission of the purchase agreement.

In addition, even if neither party knew about the illegal water hookup, lack of sewage hookup, and sunken railroad car, the “As-Is” clause in the purchase agreement allocated the risk of loss arising from conditions unknown to the parties and, therefore, defendants’ mutual mistake claim is barred. *Lorenzo, supra*.

4. Conclusion

As previously noted, defendants do not contest that they executed the promissory notes or that they failed to make the required payments. Therefore, absent a valid defense to the breach of contract action, defendants are liable for the monies owed. Defendants’ defense of unclean hands is inapplicable to this contract action, and the mutual mistake claim is barred by the “As-Is” clause in the purchase agreement. Finally, defendants have not offered proof sufficient to establish either fraud or silent fraud. Accordingly, the Court finds that defendants breached their contract with Deacon when they failed to make payment on the promissory notes, and are liable to Deacon as per the terms of the purchase agreement.

For foregoing reasons, the Court will grant defendant's motion for summary disposition pursuant to MCR 2.116(C (10), and will dismiss defendants' counter-claims of fraudulent misrepresentation, silent fraud, and mistake of fact.²

/s/ Daniel P. Ryan

Circuit Judge

DATED: 3/30/2015

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The Court does not find that the filing of the counter-complaint in this case was frivolous, and will therefore deny Deacon's request for sanctions.